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Ms Kate Jenkins
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National Inquiry into Sexual Harassment in Australian Workplaces

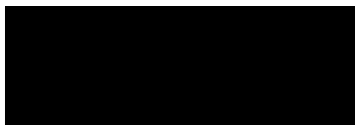
28 February 2019

Dear Ms Jenkins,

National Inquiry into Sexual Harassment in Australian Workplaces

Thank you for your invitation to participate in the National Inquiry into Sexual Harassment in Australian Workplaces. The AIER is pleased to make the following submission.

Yours sincerely,



Renee Burns
Executive Director
AUSTRALIAN INSTITUTE OF EMPLOYMENT RIGHTS

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National Inquiry into Sexual Harassment in Australian Workplaces

Submission of the Australian Institute of Employment Rights

28 February 2019

Contact: Renee Burns, Executive Director



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Introduction

The Australian Institute of Employment Rights (AIER) thanks the Sex Discrimination Commissioner for this important Inquiry and for the opportunity to make this submission.

The AIER is an independent not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of workers and employers in a cooperative workplace relations framework.

The work of the AIER is informed by the Australian Charter of Employment Rights (the Charter).¹ Developed by the AIER in 2007, the Charter identifies the fundamental values upon which we believe good workplace relationships and laws must be based if they are to provide for fair and decent work. The Charter is based on fundamental rights enshrined in international instruments that Australia has willingly adopted and which, as a matter of international law, it is bound to observe; as well as values imbedded in Australia's history of workplace relations such as the 'important guarantee of industrial fairness and reasonableness'.² Central to the Charter are the concepts of decent work and dignity. The Charter states:

Recognising that labour is not a commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- *treated with respect;*
- *recognised and valued for the work, managerial or business functions they perform;*
- *provided with opportunities for skill enhancement and career progression;*
- *protected from bullying, harassment and unwarranted surveillance.*³

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- *race, colour, descent, national, social or ethnic origin*
- *sex, gender identity or sexual orientation*
- *age*
- *physical or mental disability*
- *marital status*
- *family or carer responsibilities*
- *pregnancy, potential pregnancy or breastfeeding*
- *religion or religious belief*
- *political opinion*
- *irrelevant criminal record*
- *union membership or participation in union activities or other collective industrial activity*
- *a membership of an employer organisation or participation in the activities of such a body*
- *personal association with someone possessing one or more of these attributes*⁴

¹ Mordy Bromberg and Mark Irving (eds), *The Australian Charter of Employment Rights* (Hardie Grant Books, 2007). The ten Charter principles are included at appendix A.

² *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523-5].

³ Bromberg and Irving, above n 1, 19.

⁴ Bromberg and Irving, above n 1, 28.

It is the position of the AIER that Australian labour law is failing in the provision of decent work and the protection of dignity for Australian workers. Such failings are evidenced by the increase in insecure work, our failing enterprise bargaining system⁵, persistent wage stagnation⁶, wage theft and avoidance of workplace laws⁷, high levels of workplace stress⁸ and the abhorrent levels of workplace sexual harassment⁹.

Terms of reference

The AIER notes that the National Inquiry seeks to review and report on:

- *a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector*
- *online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment*
- *the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment*
- *the drivers of workplace sexual harassment, including whether:*
 - *some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability*
 - *some workplace characteristics and practices are more likely to increase the risk of sexual harassment*
- *the current legal framework with respect to sexual harassment*
- *existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism, and*
- *recommendations to address sexual harassment in Australian workplaces.*

The AIER does not seek to address each of the terms of reference for the Inquiry individually in detail. Rather, in this submission the AIER has focused on key issues concerning sexual harassment in Australian Workplaces including the drivers of sexual harassment; the inability of current regulatory approaches to effectively combat and prevent the occurrence of sexual harassment at work; and future directions for regulation.

⁵ See Renee Burns and Keith Harvey, 'Collective Bargaining: Delivering for the public interest?' (Ron McCallum Debate Discussion Paper, Australian Institute of Employment Rights, October 2018); Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act*, (Federation Press; 2018); Alison Pennington, 'On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector' (Research Report, The Australia Institute, Centre for Future Work, December 2018).

⁶ See Joe Isaac, 'Why are Australian Wages Lagging and What Can be Done About it?' (2018) 51(2) *Australian Economic Review*, 175; Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia*, (University of Adelaide Press, 2018).

⁷ See, eg, Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network' (Report, 2016); Fair Work Ombudsman, 'More Allegations against Melbourne Burger Bar Operator' (Media Release, 19 January 2017).

⁸ Lifeline Australia, 'Survey Results, 2016' reported at <<https://www.lifeline.org.au/about-lifeline/media-centre/media-releases/2018-articles/call-to-aussie-bosses-let-your-workers-stress-down>>.

⁹ Australian Human Rights Commission, 'Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces' (Survey Results, 2018).

The AIER has made a number of detailed submissions regarding other matters which are highly relevant to the discussion of sexual harassment in the workplace, these include:

- Submission to the Standing Committee on Education and Employment regarding *Workplace Culture and Bullying*¹⁰
- Submission to the Federal Government regarding *Preventative Health and Workplace Culture*¹¹

These submissions are available at the AIER website: www.aierights.com.au.

Recommendations

In considering sexual harassment in Australian workplaces and current legislation in this area the AIER recommends:

- I. a broad-based public education campaign be undertaken to build a greater understanding of sexual harassment and its drivers and promote the empowerment of high-risk workers in our community;
- II. reforms aimed at addressing workplace sexual harassment must be framed to encourage and facilitate the rational synchronisation of labour, equality and workplace health and safety law. Frameworks must be broad enough to protect all workers engaged in work, regardless of their employment status and whether undertaking that work in the private or public sphere;
- III. a positive duty approach be considered as the foundation of regulatory responses to sexual harassment at work. In this regard, regulation must set out a clear obligation for employers to address workplace culture and implement measures to prevent and minimise sexual harassment at work;
- IV. where positive duties are imposed, regulatory bodies be properly trained and equipped to undertake monitoring and enforcement actions;
- V. the Fair Work Act be amended to prohibit sexual harassment;
- VI. the Fair Work Commission be empowered to hear complaints of sexual harassment in the workplace and resolve such complaints on their merits through conciliation and if necessary, arbitration;
- VII. consideration of ways in which the Fair Work Act might be amended to further to interests of gender equity in terms of pay, representation, care and domestic violence issues;
- VIII. sexual harassment be formally recognised as a cause of psychological injury at work and specific regulations and systems be developed for the prevention, reporting and monitoring of associated injury;
- IX. the Australian Government fully support the ratification and implementation of the new ILO Convention on Violence and Harassment in the World of Work and the supporting Recommendation preventing violence and harassment in the world of work.

¹⁰ Lisa Heap and Keith Harvey, Submission No 109 to the Standing Committee on Education and Employment, *Inquiry into Workplace Bullying* (29 June 2012).

¹¹ Australian Institute of Employment Rights, Submission to the Australian Government regarding *Preventative Health and Workplace Culture* (August 2009).

Understanding Sexual Harassment

Sexual harassment is any unwanted or unwelcome sexual behaviour, which makes a person feel offended, humiliated or intimidated.¹² Sexual harassment is not an expression of sexuality or sexual desire; instead sexual harassment is an extension of sexism and gender inequality.¹³

The results of the Australian Human Rights Commission's Fourth national survey on sexual harassment in Australian workplaces (AHRC National Survey)¹⁴ indicate that in the last five years, one in three people have experienced sexual harassment at work. The perpetrators of sexual harassment are overwhelmingly male.¹⁵

Women are reported as more likely than men to experience sexual harassment, as are persons with a disability; those who identify as LGBTIQ+; Aboriginal or Torres Strait Islander people;¹⁶ and migrant workers.¹⁷

The increasing utilisation of insecure workers presents a challenge to addressing workplace sexual harassment. Today, around 40% of Australian workers are engaged in insecure work¹⁸. Workers most likely to be engaged in insecure and non-standard forms of employment are women, temporary migrant workers and young people.¹⁹ In addition to the existing vulnerability of these groups with regard to workplace sexual harassment, the nature of their engagement further reduces their voice at work and agency for addressing sexual harassment.

Most instances of sexual harassment go unreported. The AHRC National Survey reported only 17% of people made a formal report or complaint in relation to workplace sexual harassment²⁰ with 45% of complainants reporting no changes occurred at their workplace as a result of the complaint.²¹

Sexual harassment cannot be adequately addressed in the workplace without broader attention given to understanding sexism and gender-based inequality as drivers of the behaviour. These drivers are directly named in the proposed ILO *Convention on Violence and Harassment in the World of Work* and provide an informed starting point for programmes for preventative action.²²

In recognising the drivers of sexual harassment are sexism and gender-based power imbalances, and their origin in broader community culture and standards the AIER recommends that a broad-based public education campaign be undertaken to build a greater understanding of sexual harassment and its drivers and promote the empowerment of high-risk workers in our community.

¹² 'Sexual Harassment', Australian Human Rights Commission (webpage) <<https://www.humanrights.gov.au/our-work/sex-discrimination/guides/sexual-harassment>>.

¹³ Vicki Schultz, 'Open Statement on Sexual Harassment from Employment Law Scholars' (2018) 17 *Stanford Law Review Online* 17, 18-20.

¹⁴ Australian Human Rights Commission, 'Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces' (Survey Results, 2018).

¹⁵ Ibid 32.

¹⁶ Ibid 26-28.

¹⁷ International Labour Organisation 'Proposed Recommendation concerning the elimination of violence and harassment in the world of work' *Ending violence and harassment in the world of work*, Report V(1), International Labour Conference, 108th Session, Geneva, 2019, 21, II 12.

¹⁸ Australian Council of Trade Unions, 'Australia's insecure work crisis: Fixing it for the Future' (Research Report, 2018).

¹⁹ Anthony Forsyth, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (Final Report, August 2016), ch 7; Tanya Carney and Jim Stanford, 'The Dimensions of Insecure Work: A Factbook' (Research Report, The Australia Institute, Centre for Future Work, 29 May 2018).

²⁰ Ibid 67.

²¹ Ibid 77.

²² International Labour Organisation *Ending violence and harassment in the world of work*, Report V(1), International Labour Conference, 108th Session, Geneva, 2019. The proposed Convention is discussed below.

The Approach of Australian Regulation

Workplace sexual harassment sits at an intersection of labour, equality and workplace health and safety law. Reforms aimed at addressing and preventing harassment in this context must consider the existing framework and explore possibilities for new frameworks to harmonise these approaches.

The AIER recommends that reforms aimed at addressing workplace sexual harassment must be framed to encourage and facilitate the rational synchronisation of labour, equality and workplace health and safety law. Frameworks must be broad enough to protect all workers engaged in work, regardless of their employment status and whether undertaking that work in the private or public sphere.

Sex Discrimination Act 1984 (Cth)

At a federal level sexual harassment in the workplace is outlawed under the *Sex Discrimination Act 1984* (Cth) (SDA), similar provisions are found in State and Territory legislation. The provisions of the SDA extend beyond the employment relationship and apply to ‘workplace participants’ including employers, employees, commission agents, contract workers and partners.²³ The act provides complainants with a means for advancing complaints to conciliation with the AHRC and where conciliation is unsuccessful enables Federal Court action.

The objects of the SDA to ‘eliminate, so far as is possible, discrimination involving sexual harassment in the workplace’.²⁴ The inclusion of the qualifier ‘so far as is possible’ undermines a genuine commitment to the elimination of workplace sexual harassment. Further, any commitment to the elimination of sexual harassment at work is illusory under the Act in its current form. The reactive complaints mechanism provided by the SDA offers no means of preventative action and encourages best practice only in the context of defending actions of vicarious liability.²⁵ Employers are under no positive duty to eliminate workplace sexual harassment. Further the SDA fails to prescribe any capacity for the monitoring or enforcement of standards or preventative systems.

The AIER recommends that a positive duty approach be considered as the foundation of regulatory responses to sexual harassment at work. In this regard, regulation must set out a clear obligation for employers to address workplace culture and implement measures to prevent and minimise sexual harassment at work.

Where positive duties are imposed, the AIER recommends regulatory bodies be properly trained and equipped to undertake monitoring and enforcement actions.

The Fair Work Act 2009 (Cth)

In its current form the FWA provides no explicit protection from sexual harassment at work. It does seek to address issues of discrimination in national system workplaces through the adverse action provisions,²⁶ however these protections have proved a poor substitute for those found in equality law owing to a narrow interpretation of what constitutes ‘discrimination’, and the imported requirement that for a person to have been discriminated against, offending actions must have been performed *intentionally*.²⁷

²³ *Sex Discrimination Act 1984* (Cth) s 28B(7).

²⁴ *Ibid* s 3(c).

²⁵ *Ibid* s 106.

²⁶ *Fair Work Act 2009* (Cth) s 351.

²⁷ For discussion see Anna Chapman, ‘Freedom from Discrimination and Harassment’ in Clare Ozich (ed) *Employment Rights Now: Reflections on the Australian Charter of Employment Rights* (Hardie Grant Books,

The anti-bullying provisions of the FWA²⁸ might be used to pursue sexual harassment but are limited to behaviours that are *repeated* and occur whilst the person is 'at work'²⁹ in a national system workplace.

The AIER recommends that the Fair Work Act be amended to prohibit sexual harassment.

The AIER recommends that the Fair Work Commission be empowered to hear complaints of sexual harassment in the workplace and resolve such complaints on their merits through conciliation and if necessary, arbitration.

Recognising that the drivers of workplace sexual harassment lie in sexism and gender inequality, the introduction of measures to address gender pay equity; female representation across occupations and at senior management level; and effectively manage issues of care and domestic violence may go some way to helping to eliminate workplace sexual harassment.

The AIER recommends consideration of ways in which the Fair Work Act might be amended to further to interests of gender equity in terms of pay, representation, care and domestic violence issues.

Model Work Health and Safety Law

The primary duty imposed by the Model Work Health and Safety laws (WHS) is such that:

- (1) *A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:*
 - (a) *workers engaged, or caused to be engaged by the person; and*
 - (b) *workers whose activities in carrying out work are influenced or directed by the person,**while the workers are at work in the business or undertaking.*

As sexual harassment poses a serious risk to psychological and physical health, the framing of the Model Act imposes a positive duty on persons conducting a business or undertaking to ensure workers are not exposed to sexual harassment at work. However, regulators in this space do not have the capacity to manage sexual harassment by way of either specifically targeted preventative systems; or support for sexually harassed workers.

The AIER recommends that sexual harassment be formally recognised as a cause of psychological injury at work and specific regulations and systems be developed for the prevention, reporting and monitoring of associated injury.

ILO Convention on Violence and Harassment in the World of Work

Recognising the need to address gendered violence and harassment at work, the International Labour Organisation (ILO) is working toward introducing a new convention on Violence and Harassment in the World at Work. Significantly the proposed Convention names unequal gender-based power relations as a cause of gender-based violence and harassment (including sexual

2015) 33; Anna Chapman, Beth Gaze and Adriana Orifici, 'Substantive equality at work: Still elusive under Australia's Fair Work Act' (2017) 30(3) *Australian Journal of Labour Law* 214.

²⁸ *Fair Work Act 2009* (Cth) Part 6-4B.

²⁹ *Ibid* s 789FD(1).

harassment). The proposed Convention applies broadly to workers³⁰ and captures instances of violence and harassment ‘in the course of, linked with or arising out of work’.³¹

In accordance with the tripartite approach of the ILO, the Convention acknowledges the need for consultation with social partners on the development of legislation, regulations and measures to identify, address and prevent violence and harassment at work.

In its current form the Convention will require ratifying members to adopt an ‘integrated and gender-responsive approach for the elimination of violence and harassment in the world of work’.³² This approach includes:

- (a) *prohibiting in law all forms of violence and harassment;*
- (b) *ensuring that relevant policies address violence and harassment;*
- (c) *adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment;*
- (d) *establishing and strengthening enforcement and monitoring mechanisms;*
- (e) *ensuring access to remedies and support for victims;*
- (f) *providing for sanctions;*
- (g) *developing tools, guidance, education and training, and raising awareness; and*
- (h) *ensuring effective means of inspection and investigation of cases of violence and harassment through labour inspectorates or other competent bodies.*³³

The Convention represents a broad based approach to preventing gender-based violence and harassment at work. It requires member states to identify high risk ‘sectors, occupations and work arrangements’ with respect to violence and harassment at work and to implement targeted measures to effectively address such workers.³⁴

The development of this convention is an important step in recognising the impact of workplace violence and harassment on the exercise of workers human rights and freedoms and working, in consultation with social partners toward effective prevention and elimination of gender-based violence and harassment at work.

The AIER recommends that the Australian Government fully participate in and support the ratification and implementation of the new ILO Convention on Violence and Harassment in the World of Work and the supporting Recommendation preventing violence and harassment in the world of work.

³⁰ International Labour Organisation ‘Proposed Convention concerning the elimination of violence and harassment in the world of work’ *Ending violence and harassment in the world of work*, Report V(1), International Labour Conference, 108th Session, Geneva, 2019, 16, art 1 (c).

³¹ Ibid art 2.

³² Ibid art 4(2).

³³ Ibid.

³⁴ Ibid art 8(1).

Appendix A - Australian Charter of Employment Rights

Recognising that

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

And drawing upon

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1 Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a “fair go all round”.

2 Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

3 Freedom from Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

4 A Safe and Healthy Workplace

Every worker has the right to a safe and healthy working environment.

Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

5 Workplace Democracy

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith.

Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

6 Union Membership and Representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.

Every worker has the right to be represented by their union in the workplace.

7 Protection from Unfair Dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organization standards.

8 Fair Minimum Standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

9 Fairness and Balance in Industrial Bargaining

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.